1980

Lowell Isaac Black v. Sonya Gustaveson Black and State of Utah : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

LOWELL ISAAC BLACK,

Plaintiff-Appellant,

vs. Case No. 17097

SONYA GUSTAVESON BLACK
and THE STATE OF UTAH,

Defendants-Respondents.

APPELLANT'S BRIEF

Appeal from the judgment of
the Third Judicial District for Salt Lake County
Honorable Edward A. Watson

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Other State Cases

Accessory Supply Co. v. Kayser, 417 P.2d 481 (Colo. 1966).
Collins v. Superior Court, 310 P.2d 103 (Calif. 1957).
Lee Wayne Co., Inc. v. Pruitt, 550 P.2d 1374 (Okla. 1976).
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Santee v. North, 574 P.2d 191 (Kan. 1977).
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Statutes

Utah Code Annotated, Section 78-45-4.
Utah Code Annotated, Section 78-45-7.
Utah Code Annotated, Rule 52(b).

STATEMENT OF NATURE OF THE CASE

This is an appeal from an order and judgment against the plaintiff awarding the State of Utah $3,500.00 as delinquent child support.

DISPOSITION IN LOWER COURT

Upon an order to show cause hearing, Judge Edward R. Watson, of the Third District Court of Salt Lake County, State of Utah, awarded the state $3,500.00 and found that the plaintiff was delinquent in child support payments in the amount of $100.00 per month for thirty five months during the period of July, 1976 through May, 1979.

RELIEF SOUGHT ON APPEAL

1. That this court find that there was insufficient evidence to support the judgment in that the state did not present any evidence as to the amount of the subsidy contributed to the support of the plaintiff's minor child.

2. That this court find that all money to be paid by the plaintiff by virtue of the decree must go to child support and cannot be allocated to alimony in the absence of a judgment for alimony.

3. That this court find that the state should look to the defendant mother to recover child support subsidies which are in excess of the requirements of the decree pursuant to Utah Code Annotated, Section 78-45-4.

4. That this court find that the plaintiff has substantially complied with the terms of the decree of divorce.

5. That this court dismiss the judgment of the Third District Court.

STATEMENT OF FACTS

The plaintiff filed for divorce on September 26, 1975. Thereafter, the plaintiff and defendant entered into a Stipulation, Waiver and Property Settlement Agreement. It was provided that all of the substantial property including the residence and car be awarded to the defendant. Custody of the parties' minor child was also awarded to the defendant.

At the time of the agreement, the plaintiff was enrolled in the College of Pharmacy at the University of Utah. Plaintiff was a part time employee with a meager income, therefore, the Stipulation, Waiver and Property Settlement Agreement provided that, "....the plaintiff shall pay to the defendant $50.00 per month during the period that the plaintiff is attending the university, but upon his employment, the plaintiff shall pay $150.00 per month as child support...." (Record at 7).

A decree of divorce was issued on November 7, 1975 and it was provided in part,"....That the plaintiff be, and he hereby is, ordered to pay to the defendant $50.00 per

month for the care and support of the parties' minor child. Michele, during the period that the plaintiff is continuing his university education and $150.00 per month upon his employment...."(Record at 19).

The plaintiff paid $50.00 per month to the clerk of the court until September, 1979, when he increased his payments (Tr. at 16).

All waiting periods were waived and the defendant re-married within a period of a few days. Subsequently, the plaintiff brought actions to have the divorce set aside, to specify his visitation rights, and to regain his share of the equity in the home. Simultaneously, the plaintiff was placed on probation in the College of Pharmacy and his financial situation declined (Record at 41-42).

On March 18, 1976, the state entered an administrative order which required payment to the state for monies furnished to the defendant (Record at 37-38). Payments to the defendant began on August, 1975 and ran through May 1979 (Record at 70).

The State of Utah joined the defendant as the real party in interest (Record at 58) and initiated an order to show cause proceeding to recover funds contributed to the defendant.

The plaintiff was employed at part time jobs until February 11, 1978. Upon that date he began regular full time employment. Also, he attended the university each quarter during 1975 and 1976. He attended the university winter quarters during 1977 and 1978. In September, 1979, the parties' entered into a stipulation which provided, in part, that the plaintiff would pay $100.00 per month as child support and he has since made payments in that amount (Tr. 19).

POINT I

THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A JUDGMENT.

While the state, in this instance, had the burden of proof, the entire record contains no evidence as to the amount of money the state has contributed to the defendant as child support. The affidavits supporting the Order to Show Cause indicate only that there were monthly payments to the defendant as welfare. What portion, if any, of the payments was allocated as child support is unknown. These affidavits were never entered into evidence or supported by testimony at the hearing (Tr.). By stipulation, the defendant waived alimony. The Decree of Divorce does not provide alimony. Therefore, the plaintiff is not liable for any funds subsidizing his former wife. In Reeves v. Reeves, 556 P2nd 1267 (Utah 1976),

when the State Division of Family Services sought reimbursement for public assistance money expended on behalf of a wife, the court held that the state was not entitled to judgment against the husband prior to an adjudication of the wife's right to support. The court then stated at 1268, "We therefore agree with the ruling of the trial court that Family Services has shown no proper foundation to base a judgment against the defendant for reimbursement for support of plaintiff Margaret Reeves....".

While the affidavits simply indicate a lump sum amount paid to the defendant in this case, the Order to Show Cause and the Order and Judgment indicate the issue in question is child support. A judgment cannot be founded on mere speculation when there is no basis in evidence for the amount of the verdict. In Accessory Supply Company v. Kayser, 417 P2d 481 (Colo. 1966), the court affirmed a judgment notwithstanding the verdict in a dispute in which the jury returned a verdict in an amount inconsistent with any 'cular legal theory or contract.

.ionally, even though the defendant signed a .ation agreement with the state, the right to receive .t payments belongs to the child and cannot be .ered away. Baggs v. Anderson, 528 P2d 141 (Utah 1974).

Therefore, the state cannot collect an amount which is in excess of that which was given as child support. Any amount reimbursing the state for support of the defendant would be improper.

The issue of insufficiency of the evidence goes to the finding of fact that the defendant was in arrears. Utah Code Annotated, Rule 52(b) provides:

> .... When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

If the judge at the order to show cause hearing took judicial notice of the affidavit in the file there has been a due process violation of the plaintiff's rights. When in a contempt hearing upon an order to show cause affidavits were assumed to be true the court held in Collins v. Superior Court, 310 P.2d 103 (Calif. 1957) as follows:

> ....the court could not take judicial notice of and assume as true the facts stated in affidavits upon which the orders to show were issued until the defendant had an opportunity to challenge such facts as evidence, and in doing so, the court deprived the husband of due process.

The court further explained that the affidavits could serve as evidence at the hearing, but upon being offered, the

person accused of contempt would have had the right to question the relevancy or competency of any matter stated therein. A court can take judicial notice of child support orders it had made, but cannot take judicial notice and assume as true the facts stated in affidavits. Certain courts have held that the use of an affidavit may be permissible when testimony is cumulative or of minor importance, but when the outcome is directly dependent on a document it should not be admitted. Lee Wayne Co., Inc. v. Pruitt, 550 P2d 1374 (Okla.1976). A similar ruling may be found in Bench v. State Auto & Casualty Underwriters, Inc., 408 P.2d 899 (Wash. 1965) when in an action against an insurance company, the court properly refused to receive in evidence at trial involving the issue of whether an assignment of a cause of action was what it purported to be.

It may be argued that an order to show cause hearing is less important that a trial of another nature. But the taking of property without due process is a violation of an important constitutional right. The court in Maloy v. Griffith, 440 P.2d 923 (Colo. 1952) spoke of an action in a small claims court which was based on an affidavit by a corporate officer an other documents that were not authenticated by a witness and the court held that even under the relaxedrules of pleading and evidence in a

small claims court, standards of due process must be met.

In Lee Wayne Co., Inc. v. Pruitt, 550 P2d 1374, at 1375

the court quoted :

> "....The conviction that no statement (unless by special exception should be used as testimony until it has been probed and submitted by that test, (of cross examination) has found increasing strength in lengthening experience." V. Wigmore on Evidence (3d ed.) Section 1367.

The court continued:

> ....The right to cross examine witnesses is the most valuable right given by law in assisting the trier of facts in determining the truth of direct testimony. The plaintiff did not satisfy its burden of proof by submitting any competent evidence.

Additionally, the evidence in the affidavit in this record is not a complete record, but only a summary of evidence. Such a summary, to be admissible, must be shown to have been developed from records, books or documents, the competency of which has been established and the records must be available for examination and the witnesses must be subject to cross-examination. Shup v. Menlove, 417 P 2d 246 (Utah 1960). For similar rulings concerning judicial or quasi judicial hearing and the importance of due process see Santee v. North, 574 P.2d 191 (Kan. 1977) and concerning reports of welfare departments entered into evidence and importance of due process see Aylor v. Aylor, 478 P.2d 302 (Colo. 1970). In plaintiff's case there was insufficient evidence which resulted in a due process violation.

POINT II

THE PLAINTIFF HAS SUBSTANTIALLY COMPLIED WITH THE DECREE OF DIVORCE.

The plaintiff was employed only part time when the Decree of Divorce was issued in November 1975. His part time employment continued to February 11, 1978. He was also engaged in university attendance full time during 1975 and 1976. The Decree required an increase in child support payments upon the occurrence of two events. The first event was a change or discontinuance of plaintiff's educational status and the second event was a change of plaintiff's employment status. These events are comparable to the substantial change in circumstance required for modification of a divorce decree in Utah. Utah Code Annotated, Section 78-45-7 states that, "Prospective support shall be equal to the amount granted by prior court order unless there has been a material change of circumstance on the part of the obligor or obligee.". The Code also sets out relevant factors a court might consider, among which are living conditions and wealth. Considering the intent of the Decree together with the facts, the increase in support payments should not have been applied to the plaintiff until February, 1978.

In order to seek equity, one must have acted equitably. The plaintiff paid the family debts, gave the defendant all

of the family assets including a substantial equity in the home and made regular payments of child support. The plaintiff did not contemplate that the defendant would immediately remarry and apply for welfare under the popular "Stepfather's Assistance Program".

CONCLUSION

The judgment against plaintiff was based upon insufficient evidence. The state's affidavit was not entered into evidence. It was taken into account, if at all, by judicial notice. Even if the affidavit is accepted as evidence, it is incomplete as an account of the amount granted as child support and remains only a summary of the state's record. The procedure in this case violated due process. Further, an examination of the facts would find that the plaintiff complied with the Decree of Divorce until February 11, 1978. But, the amount of child support paid by the state from that date on must be determined prior to the determination of the amount of a judgment. A judgment must be consistent with some legal theory concerning the amount of funds that the state has expended.

The ambiguity of the Decree should be examined in the light of general Utah law requiring a change in circumstance before a Decree is modified.

The judgment should therefore be vacated.

DATED this _____day of August, 1980.

HAND DELIVERY CERTIFICATE

I do hereby certify that a copy of the foregoing Brief was hand delivered to J. Dennis Kroll, Deputy County Attorney, 243 East 400 South, Salt Lake City, Utah 84111; Robert B. Hansen, Attorney General, State Capitol, Salt Lake City, Utah 84103; B.L.Dart, Attorney at Law, Ten Broadway Building, Salt Lake City, Utah 84101 on the _____day of August, 1980.

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